

United Brotherhood of Carpenters & Joiners of America, Local 210 Western Connecticut, AFL-CIO and A. F. Underhill, Inc. and District Council of Connecticut, International Union of Bricklayers & Allied Crafts Workers, AFL-CIO. Case 34-CD-55

April 24, 1997

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN GOULD AND MEMBERS FOX¹ AND HIGGINS

The charge in this Section 10(k) proceeding was filed December 13, 1996, alleging that the Respondent, United Brotherhood of Carpenters & Joiners of America, Local 210 Western Connecticut, AFL-CIO, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing A. F. Underhill, Inc. to assign certain work to employees it represents rather than to employees represented by District Council of Connecticut, International Union of Bricklayers & Allied Crafts Workers, AFL-CIO. The hearing was held January 9, 1997, before Hearing Officer Michael C. Cass.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that the Employer, a Massachusetts corporation with its main offices located in Canton, Massachusetts, is engaged in providing various construction services, including drywall installation, fixturing, low temperature construction, and building insulation, and, at relevant times, is engaged in installing firestopping building insulation at the Swiss Bank project in Stamford, Connecticut, under a contract with the Commercial Brick Corporation of Mespeth, New York. The Employer annually performs services outside the Commonwealth of Massachusetts valued in excess of \$50,000 and purchases and receives at its Massachusetts facility parts, goods, and materials valued in excess of \$50,000 shipped directly from points located outside of Massachusetts. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Carpenters Union and the Bricklayers Union are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

Turner Construction is the construction manager for the Swiss Bank project. Commercial Brick is a sub-

contractor to Turner. Commercial has a contract with the Bricklayers Union. Commercial subcontracted the disputed work in this case to Underhill. Underhill obtains its employees from Ayla Corporation. Ayla has a contract with the Carpenters Union.

In August 1996 Underhill assigned the disputed work to carpenters supplied by Ayla. On December 5, 1996, Underhill Representative Blasdel Reardon received a phone call from Bricklayers Representative Ed Moavero. During the conversation, Moavero told Reardon that Underhill should be using masons to perform the disputed work, and Reardon replied that Underhill preferred to use carpenters.

Shortly thereafter, Moavero requested a hearing about the disputed work pursuant to the Project Stabilization Agreement between Turner and the Fairfield County Building Trades. On December 11, 1996, the jurisdictional dispute board awarded the work to the Bricklayers.² On December 13, 1996, based on a rumor relayed to him from the jobsite, Carpenters Representative Richard Warga, in a phone conversation, told Underhill Representative Edward Slavin that if Underhill reassigned the work to bricklayers, Warga "would pull every carpenter off the [Swiss Bank] job."

B. Work in Dispute

The disputed work involves firestopping insulation work at the Swiss Bank jobsite in Stamford, Connecticut.

C. Contentions of the Parties

The Employer and the Carpenters Union contend that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the disputed work should be assigned to employees represented by the Carpenters Union. The Bricklayers Union contends that the 10(k) notice should be quashed because there is a voluntary method for adjusting the dispute. Alternatively, the Bricklayers Union contends that the disputed work should be assigned to employees it represents.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. This requires a finding that there is reasonable cause to believe that a party has used proscribed means to enforce

² Because Underhill and the Carpenters Union were not informed of the hearing, the dispute board scheduled a second hearing. Underhill attended, but the Carpenters Union did not. On December 30, 1996, the dispute board again awarded the work to the Bricklayers Union.

¹ Member Fox did not participate in the decision on the merits.

its claim and that there are competing claims to the disputed work between rival groups of employees.

As described above, both Unions claim the work in dispute. Further, the Carpenters Union threatened to "pull every carpenter off the job" if the disputed work was reassigned to bricklayers. We conclude that there are active competing claims to the disputed work and that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred.

The Bricklayers Union claims that the project agreement provides a method for voluntary adjustment of the work dispute which would bind all the parties. Yet, Underhill and the Carpenters Union are not parties to that agreement. We find that there is no method for voluntary adjustment of the dispute to which all parties have agreed.

Based on the above, we find that the dispute is properly before the Board for determination.³

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreement

There is no Board certification involving the work in dispute. The Employer is not a party to a collective-bargaining agreement with either union.

Both Unions argue that contracts with other employers bind Underhill to their respective collective-bargaining agreements. Neither contract refers to "firestopping" work. Both the Bricklayers contract with Commercial Brick and the Carpenters contract with the Associated General Contractors of Connecticut contain language that arguably covers the work in dispute.⁴ Under these circumstances, even assuming that Underhill was bound by one or both contracts, we are unable to conclude that either contract clearly favors awarding the work in dispute to one group of employees over the other.

2. Employer preference

The Employer prefers that the work in dispute be done by employees who are represented by the Carpenters Union. This factor favors awarding the work in dispute to employees represented by the Carpenters Union.⁵

3. Employer past practice

The Employer introduced evidence that it has a practice of using carpenters supplied by Ayla to perform similar work on other projects. This factor favors awarding the work in dispute to employees represented by the Carpenters Union.

4. Area and industry practice

Both Unions introduced evidence of area and industry practice that they claim supports awarding the disputed work to employees they represent. This factor does not favor awarding the work in dispute to either group of employees.

5. Relative skills

Both Unions presented testimony that the employees they represent are qualified to perform the disputed work. This factor does not favor awarding the work in dispute to either group of employees.

6. Economy and efficiency of operations

The record shows that Underhill is performing firestopping work at the Swiss Bank project pursuant to four contracts. Underhill utilizes the same carpenters to work on the Commercial Brick and other projects. Were Underhill required to use bricklayers on the Commercial Brick project, Underhill's flexibility would be reduced. Consequently, this factor favors awarding the work in dispute to employees represented by the Carpenters Union.

Conclusions

After considering all the relevant factors, we conclude that employees represented by United Brotherhood of Carpenters & Joiners of America, Local 210 Western Connecticut, AFL-CIO are entitled to perform the work in dispute. We reach this conclusion relying on employer preference, past practice, and economy and efficiency of operation. In making this determination, we are awarding the work to employees represented by the Carpenters, not to that union or its members. The determination is limited to the controversy that gave rise to this proceeding.

³ Accordingly, we deny the Bricklayers' motion to dismiss.

⁴ The contract between Ayla and the Carpenters Union binds those parties to the collective-bargaining agreement between the Carpenters Union and the Associated General Contractors of Connecticut.

⁵ We do not agree with the argument, implicit in the Bricklayers' position, that Underhill is not an employer in this case. Whether Underhill employs the carpenters directly or uses carpenters supplied by Ayla, it is clear that Underhill is making the decision to hire and is controlling the work.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of A. F. Underhill, Inc. represented by United Brotherhood of Carpenters & Joiners of America, Local 210 Western Connecticut, AFL-CIO are entitled to perform firestopping insulation work at the Swiss Bank jobsite in Stamford, Connecticut.